Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-822

PAUL SCOTT,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

PETITION FOR CERTIORARI

The Petitioner, Paul Scott, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued and filed on the 24th day of October, 1979.

OPINION BELOW

Nos. 78-5425/78-5479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL SCOTT,
Defendant-Appellant,
and
FLETCHER HARRALSON, aka BUD FLETCHER,
Defendant-Appellant.

ORDER

(Filed October 24, 1979)

Before WEICK and MERRITT, Circuit Judges and CECIL, Senior Circuit Judge.

The defendants-appellants Scott and Harralson have appealed from a judgment of conviction entered upon a guilty verdict by the jury of the purchase, receipt and possession of chattels in excess of $100.00, namely, whiskey stolen from an interstate shipment in violation of 18 U. S. C. 659 and 2 (a).

During a heavy snow storm in Cincinnati in January 1978, a freight train carrying a shipment of whiskey from Detroit, Michigan to Augusta, Georgia was stopped. A gang of six individuals went to the train and stole 78 cases of whiskey. On the next day they stole 43 more cases. Seventy eight of the cases were sold to defendant Scott.

The sale price was $35.00 a case. Seventy seven of the 78 cases were delivered to the defendant Harralson at his used car lot in Plainville, Ohio. When they went to steal the 43 cases of whiskey on the following day, some of the thieves were caught by the police but eventually all were arrested and charged and some of them testified for the Government against Scott and Harralson.

During the trial, counsel for Scott indicated to the Court that he intended to comment on the failure of the Government to call certain witnesses particularly Everett Adams who was one of the thieves. The Court made inquiry into the facts and learned that Adams had been transferred to the Terre Haute Federal Penitentiary but had been incarcerated locally prior to that time. Adams therefore could have been subpoenaed by either the Government or by the defendants, but they did not avail themselves of this privilege. The Court then told counsel for the defendants that if they commented on the failure of the Government to subpoena Adams, it would permit the Government to comment on their failure to subpoena him. We see nothing wrong with this ruling.

Finally it is contended that the court erred in denying Scott's motion for a mistrial.

During the jury deliberation a note was sent to the judge by a member of the jury with the following question:

> If a juror overheard a witness outside of Court admit he told a lie on the witness stand, does this interest you or should it even be considered in our deliberations?

After consulting with counsel for all sides on the issue, the judge sent back the following answer:

> The weight and credibility of any witness' testimony is for you alone to decide.

No objections were made to this procedure, although the attorney for defendant Scott made a motion for a mistrial which the judge subsequently construed as covering both of the defendants. The motions for mistrial were taken under advisement and subsequently denied.

Defendants Harralson and Scott both claimed that the Court erred in not granting a mistrial because of the juror's outside knowledge which was communicated to the other jurors in the case. The appellants both argue violations of their right to a fair trial and their right to confront the witness against them. The Government contends that the statement was harmless since the testimony was merely cumulative of testimony presented by two other Government witnesses who testified that the defendant Harralson was present. The Government acknowledges that any outside contact with jurors is presumptively prejudicial, under case law of this Circuit, but it argues that the cases so holding mostly involve conversations with jurors, attempted bribes, etc. A post-hearing interview of the juror who overheard the witness revealed that he had not disclosed his outside knowledge to the jury prior to receiving the judge's reply, but had subsequently done so. The witness whom he overheard was identified to be Carl Jackson a Government witness. Carl Jackson had testified that he was present at the car lot when the whiskey was unloaded and that a man was present whom he could not identify. The juror reported that he overheard the witness tell two friends in the coffee shop that "hell, Fletcher (Harralson) was right next to me when I unloaded the whiskey."

Since Jackson had previously testified that he could not identify the man who was present, his statement which the juror overheard that he lied, obviously affected his credibility as a Government witness. The District Court pursuant to agreement of the parties charged the jury that

his credibility was for the jury alone to decide. This, in our opinion, was a correct instruction. The admission by Jackson, a Government witness that he had lied was beneficial and not prejudicial to the defendants because they could also argue to the jury that Jackson lied in other particulars. In no event did it prejudice Scott.

As to Harralson also known as Fletcher, it is submitted that Harralson's presence when the whiskey was unloaded was testified to by two other Government witnesses and it did not inject anything new in the case. In our opinion, it was not prejudicial to Harralson.

Harralson was not tried or convicted for stealing the shipment of whiskey. He was only tried for purchasing, receiving and possessing part of the shipment. The overwhelming evidence shows that he was guilty as found by the jury.

The judgment of convictions are affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

By /s/ GRACE KELLER
Deputy Clerk

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 24, 1979, affirming Petitioner's conviction in the United States District Court for the Southern District of Ohio, Western Division.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291.

QUESTIONS PRESENTED

1. Whether the District Court erred in overruling Defendant-Appellant's objection which allowed the U.S. Attorney to respond to a defense comment that an adverse inference could be drawn by a failure to produce a co-conspirator as a witness.

2. Whether the District Court erred in not granting Defendant-Appellant's Motion for Mistrial.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the following, all of which are set forth in Appendix B herein:

United States Constitution, Fifth Amendment; and
United States Constitution, Sixth Amendment.

STATEMENT OF THE CASE

Defendant-Appellant, Paul Scott, was indicted on July 19, 1978, by a Grand Jury of the United States District Court for the Southern District of Ohio, Western Division. That indictment, No. CR-1-78-64, alleged violations by Defendant-Appellant and a co-defendant, Bud Fletcher, of 18 U.S.C. 659 and 2 (a). The Defendant-Appellant was named in Count Two, that he did buy, receive and have in his control chattels in excess of $100.00 stolen from an interstate shipment of freight.

On July 28, 1978, the Defendant-Appellant was arraigned and trial commenced September 11, 1978, in the United States District Court for the Southern District of Ohio. Western Division. On September 13, 1978, a jury found the Defendant-Appellant guilty. On October 6, 1978, the

Defendant-Appellant was sentenced to one (1) year and one (1) day. On October 6, 1978, the Notice of Appeal was docketed as Case No. 78-5425 in the Sixth Circuit of the United States Court of Appeals and combined with a co-defendant, Fletcher Haralson, in Case No. 78-5479. The United States Court of Appeals for the Sixth Circuit entered its decision affirming both cases on October 24, 1979.

REASONS FOR GRANTING THE WRIT

I.

The District Court Erred In Overruling Defendant-Appellant's Objection Which Allowed The U.S. Attorney To Respond To A Defense Comment That An Adverse Inference Could Be Drawn By A Failure To Produce A Co-Conspirator As A Witness.

At the conclusion of the trial, which consisted of only Government witnesses, the Court held a conference about the charge it expected to give to the jury the following day. A discussion was held about Defendant-Appellant's intention to comment on the failure to produce a witness who was one of the six (6) people who originally stole the whiskey, Mr. Adams. Another Government witness, and co-defendant of Mr. Adams, testified at the trial about conversations he had with Mr. Adams regarding activities of the Defendant-Appellant. This testimony was permitted by the Court since it involved co-conspirators. However, the Court allowed a recomment by the U.S. Attorney on the Defendant-Appellant's comment under the authority of *United States* v. *Blakemore,* 489 F. 2d 193 (1973) (6th Cir.).

However, as the *Blakemore* case applies to the instant case, the witness must be available to both sides. The availability of a witness must take into account both the practical and physical considerations. *Stewart* v. *United States,* 135 U.S. App. D.C. 274, 418 F. 2d 1110, 1115 (1969). See also: *Milton* v. *United States,* 71 App. D.C. 394, 110 F. 2d 556 (1940).

Since the prosecution cannot comment on the failure of a defendant to testify, *Johnson* v. *United States,* 313 U.S. 189, 87 L.Ed. 704, it seems only logical that the prosecution should not be permitted to comment on the failure of a defendant to call a witness.

II.

The District Court Erred In Not Granting Defendant-Appellant's Motion For A Mistrial.

The courts have long favored the rule granting the trial judge the authority to declare a mistrial and to require another panel to try the defendant when the ends of justice will be best served. *Gori* v. *United States,* 81 S.Ct. 1523, 367 U.S. 364, 6 L.Ed 2d 901 (1961), rehearing denied 82 S.Ct. 25; *Brock* v. *North Carolina,* 73 S.Ct. 349, 356, 344 U.S. 424, 427, 97 L.Ed. 456 (1953); and *United States* v. *Perez,* 9 Wheat 579, 580, 6 L.Ed. 165.

In this instance, the Court had before it information from a juror that a material Government witness had given perjured testimony at trial. The impact of this revelation upon the jury is only subject to speculation. However, our judicial system cannot allow speculation to inhibit due process in this case. A conviction based, in part, upon perjured testimony should not be permitted to remain, regardless of the exact effect of the perjury. See: *United States* v. *Polisi,* 416 F.2d 573, (C.A. 2, 1969). There is a reasonable likelihood that the judgment of the jury was affected by the perjured testimony. This Court cannot permit the jury to consider, speculate and deliberate upon perjured testimony.

On November 17, 1978, the juror was examined and it was learned that the statement of perjury was attributed to one Carl Jackson and, further, the misstatement was regarding the co-defendant, Fletcher Haralson. However, a review of the transcript shows Mr. Jackson testified at length about both defendants. The juror only heard the one comment, but there may have been others made out of his presence. The testimony of this witness was particularly damaging to Mr. Scott.

CONCLUSION

In conclusion, the Defendant-Appellant respectfully submits that the District Court erred in both Issue I and Issue II as presented in this Argument as a matter of law and the conviction should be vacated and the case remanded for a new trial.

Respectfully submitted,

H. LOUIS SIRKIN,
Attorney for Petitioner

and

MARTIN S. PINALES,
Of Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. CR-1-78-64-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

PAUL SCOTT,
Defendant,

UNITED STATES OF AMERICA,
Plaintiff,

v.

FLETCHER HARALSON,
Defendant.

ORDER

(Filed December 14, 1978)

These matters are before the Court under the following circumstances. On September 13, 1978, a jury found both defendants guilty of possessing chattels stolen from interstate shipments, in violation of 18 U.S.C. § 659. During the course of jury deliberations a message was sent to the Court as follows: "If a juror overheard a witness outside of court admit he told a lie on the witness stand, does this interest you or should it even be considered in our deliberations?" After consultation with counsel, the Court advised

the jury it writing: "The weight and credibility of any witness' testimony is for you alone to decide."

Counsel for defendant Scott, during such conference, moved orally for a mistrial (Record Sept. 13, p.3).[1] On September 21, 1978, defendant Paul Scott moved in writing for a new trial. A motion for mistrial and a new trial was filed on behalf of defendant Fletcher Haralson on December 4, 1978.

On October 18, 1978, this Court disposed of the Scott motion for a new trial in accordance with the jurisdictional limitations of Rule 33 of the Federal Rules of Criminal Procedure (Document 16). The Court reserved determination of the oral motion for a mistrial. The motion for a new trial of defendant Haralson must likewise be denied for the same jurisdictional reason.

For purposes of this determination it will be assumed that defendant Haralson joined in the oral motion for mistrial made by defendant Scott.

On November 17, 1978, juror Louis Huber was interviewed by the Court in the presence of the United States Attorney and counsel for each defendant, and a record of such interview made. Mr. Huber advised that during a recess of the trial, he was standing at a refreshment stand in the Courthouse and overheard a witness advise a companion that a portion of his testimony in court had been erroneous. There was neither contact nor conversation between the witness and juror Huber.

Upon further inquiry by the Court it was determined

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[1] In order to avoid confusion, the term "Record" herein will refer either to the testimony of Carl Jackson Sept. 12, 1978; the Chambers conference of Sept. 13, 1978; or the interview with juror Louis Huber on Nov. 17, 1978. In all instances, the appropriate identifying date will be given. No full transcript of testimony and proceedings has as yet been prepared by the Court Reporter.

that the witness in question was one Carl Jackson and that the significant portion of his testimony was as follows:

> Cross-examination by Mr. Houston [counsel for Fletcher Haralson]:
>
> Q. . . . Now you refer to a place as Fletcher's Used Car Lot?
> A. Yes.
> Q. Do you know Mr. Fletcher?
> A. No.
> Q. Have you ever seem him before?
> A. I am not sure.
> Q. Have you ever seen him since this transaction began?
> A. No.
> Q. Or seen him since?
> A. No.
>
> (Record Sept. 12, p.31)

Juror Huber recounted the incident as follows:

> He [Jackson] was asked did they unload the whiskey at Fletcher's garage and he said yes and he was asked was Fletcher there and he said no. Then a question was posed to him, did he know Fletcher or have you ever seen him before, and he said no, not until today . . . and then he says, Hell, Fletcher was standing right next to me when I unloaded the whiskey.
>
> (Record Nov. 17, p.4)

The sole question presented to the Court by the foregoing is as follows: Were defendants denied a fair trial where a Government witness in a public place and within the hearing of a juror who was appropriately in such place, admitted that a statement of his was false?

It must be obvious that unless every criminal jury is fully sequestered, the possibility of an occurrence as above described is always present. Indeed, any witness could

create a mistrial merely by placing himself in a public place and stating that his courtroom testimony was false.

This is not a case of conversation between juror and witness, juror and bailiff, or juror and counsel. It is not a case of a conversation at all. The most that can be said is that a Government witness cast doubt upon his own credibility by his out-of-court statement.

The United States presented eleven witnesses to the jury and ample evidence of guilt. Other than cross-examination of Government witnesses, no defense testimony was presented.

It is well settled that the granting of a mistrial is a matter within the discretion of the Court and such mistrial should not be granted unless there is a showing of prejudicial error. *Petro* v. *United States,* 210 F.2d 49 (6th Cir. 1054), *cert. den.* 347 U.S. 974.

Upon a review of all of the circumstances, after interrogation of the juror in question, and upon an examination of the significant testimony, this Court finds no prejudice to either defendant sufficient to require the declaration of a mistrial.

Accordingly, the motions of each defendant for mistrial are hereby DENIED.

/s/ CARL B. RUBIN
United States District Judge

Nos. 78-5425/78-5479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL SCOTT,
Defendant-Appellant,
and
FLETCHER HARRALSON, aka BUD FLETCHER,
Defendant-Appellant.

ORDER

(Filed October 24, 1979)

Before WEICK and MERRITT, Circuit Judges and CECIL, Senior Circuit Judge.

The defendants-appellants Scott and Harralson have appealed from a judgment of conviction entered upon a guilty verdict by the jury of the purchase, receipt and possession of chattels in excess of $100.00, namely, whiskey stolen from an interstate shipment in violation of 18 U. S. C. 659 and 2 (a).

During a heavy snow storm in Cincinnati in January 1978, a freight train carrying a shipment of whiskey from Detroit, Michigan to Augusta, Georgia was stopped. A gang of six individuals went to the train and stole 78 cases of whiskey. On the next day they stole 43 more cases. Seventy eight of the cases were sold to defendant Scott. The sale price was $35.00 a case. Seventy seven of the 78 cases were delivered to the defendant Harralson at his used car lot in Plainville, Ohio. When they went to steal

the 43 cases of whiskey on the following day, some of the thieves were caught by the police but eventually all were arrested and charged and some of them testified for the Government against Scott and Harralson.

During the trial, counsel for Scott indicated to the Court that he intended to comment on the failure of the Government to call certain witnesses particularly Everett Adams who was one of the thieves. The Court made inquiry into the facts and learned that Adams had been transferred to the Terre Haute Federal Penitentiary but had been incarcerated locally prior to that time. Adams therefore could have been subpoenaed by either the Government or by the defendants, but they did not avail themselves of this privilege. The Court then told counsel for the defendants that if they commented on the failure of the Government to subpoena Adams, it would permit the Government to comment on their failure to subpoena him. We see nothing wrong with this ruling.

Finally it is contended that the court erred in denying Scott's motion for a mistrial.

During the jury deliberation a note was sent to the judge by a member of the jury with the following question:

> If a juror overheard a witness outside of Court admit he told a lie on the witness stand, does this interest you or should it even be considered in our deliberations?

After consulting with counsel for all sides on the issue, the judge sent back the following answer:

> The weight and credibility of any witness' testimony is for you alone to decide.

No objections were made to this procedure, although the attorney for defendant Scott made a motion for a mistrial which the judge subsequently construed as covering both

of the defendants. The motions for mistrial were taken under advisement and subsequently denied.

Defendants Harralson and Scott both claimed that the Court erred in not granting a mistrial because of the juror's outside knowledge which was communicated to the other jurors in the case. The appellants both argue violations of their right to a fair trial and their right to confront the witness against them. The Government contends that the statement was harmless since the testimony was merely cumulative of testimony presented by two other Government witnesses who testified that the defendant Harralson was present. The Government acknowledges that any outside contact with jurors is presumptively prejudicial, under case law of this Circuit, but it argues that the cases so holding mostly involve conversations with jurors, attempted bribes, etc. A post-hearing interview of the juror who overheard the witness revealed that he had not disclosed his outside knowledge to the jury prior to receiving the judge's reply, but had subsequently done so. The witness whom he overheard was identified to be Carl Jackson a Government witness. Carl Jackson had testified that he was present at the car lot when the whiskey was unloaded and that a man was present whom he could not identify. The juror reported that he overheard the witness tell two friends in the coffee shop that "hell, Fletcher (Harralson) was right next to me when I unloaded the whiskey."

Since Jackson had previously testified that he could not identify the man who was present, his statement which the juror overheard that he lied, obviously affected his credibility as a Government witness. The District Court pursuant to agreement of the parties charged the jury that his credibility was for the jury alone to decide. This, in our opinion, was a correct instruction. The admission by Jackson, a Government witness that he had lied was bene-

ficial and not prejudicial to the defendants because they could also argue to the jury that Jackson lied in other particulars. In no event did it prejudice Scott.

As to Harralson also known as Fletcher, it is submitted that Harralson's presence when the whiskey was unloaded was testified to by two other Government witnesses and it did not inject anything new in the case. In our opinion, it was not prejudicial to Harralson.

Harralson was not tried or convicted for stealing the shipment of whiskey. He was only tried for purchasing, receiving and possessing part of the shipment. The overwhelming evidence shows that he was guilty as found by the jury.

The judgment of convictions are affirmed.

ENTERED BY ORDER OF THE
COURT

John P. Hehman, Clerk

By /s/ GRACE KELLER
Deputy Clerk

APPENDIX B

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the acused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

Supreme Court, U. S.
FILED
MAR 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-822

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-822

PAUL SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in allowing the prosecutor to state in rebuttal argument that a potential witness had been available to both sides. He also claims that he was entitled to a mistrial because a juror overheard a government witness admit that he had lied in testifying that a co-defendant was not at the scene of the crime.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of possession of goods stolen from interstate

commerce in violation of 18 U.S.C. 659. He was sentenced to imprisonment for one year and one day. The court of appeals affirmed (Pet. App. 5a-8a).[1]

The evidence at trial established that during a two-day period in January 1978, a group of six men stole 121 cases of whiskey from a snow bound freight train in Cincinnati, Ohio (Tr. 45-46, 106).[2] Petitioner arranged to buy 77 cases of the liquor and instructed that they be delivered to co-defendant Harralson's used-car lot (Tr. 128, 131, 136-141). After delivery, petitioner paid the men approximately $1800 in cash for the liquor (Tr. 142-144).

1. Petitioner contends (Br. 7-8) that the trial court improperly allowed the prosecutor to comment, in effect, on his failure to call a particular witness. This claim is without merit.

Everett Adams was one of the six men convicted of the liquor theft. In his closing, petitioner's counsel argued that the government had failed to produce "the mysterious Everett Adams" (Tr. 322). On rebuttal, the prosecutor commented that "bringing witnesses into court * * * is a two-way street. Every party that comes into court has the power to bring in any witness that they want, to subpoena any witness" (Tr. 335).[3] Shortly

[1]The judgment of the court of appeals was entered on October 24, 1979, and the petition for a writ of certiorari was not filed until November 26, 1979. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

[2]All of the men were convicted for the theft. Three of them, Rickie Teater, Bill Johnson and Carl Jackson, testified for the government at petitioner's trial.

[3]At a pre-charge conference held in chambers, petitioner's counsel informed the court that he planned to comment on the government's failure to call Adams (Tr. 280, 300). The government then requested permission to argue that Adams, who had been incarcerated locally,

thereafter, the court instructed the jury that the defendants had no duty or burden of calling any witnesses or of producing any evidence (Tr. 343, 345).

It is well settled that a prosecutor may comment on the failure of the defense to substantiate its factual claims, provided that the comment cannot be construed as a reference to the defendant's failure to testify. *United States* v. *Bubar*, 567 F. 2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Keller*, 512 F. 2d 182 (3d Cir. 1975); *United States* v. *Hager*, 505 F. 2d 737 (8th Cir. 1974). In this case, the reference was clearly not to the defendants' failure to testify but related solely to the possibility of Adams' appearance, which defense counsel first raised as an issue. As the trial court observed, Adams was equally available to both sides. The prosecutor's remarks were neither inflammatory nor prejudicial and constituted a fair response to defense counsel's unsupported implication that the government was withholding evidence because it did not call Adams. See *United States* v. *Ivey*, 550 F. 2d 243, 244 (5th Cir. 1977); *United States* v. *Stofsky*, 527 F. 2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).[4] Moreover, in light of the court's admonition moments later that the defense was not required to call any witnesses and that the government

was equally available to both sides (Tr. 279, 300-302). The court held that the witness was not "within either sides' peculiar power to produce" and that the government would be entitled to respond to the proposed defense argument (Tr. 305-306).

[4]This case is therefore unlike *United States* v. *Blakemore*, 489 F. 2d 193 (6th Cir. 1973), cited by petitioner (Pet. 7-8), in which the prosecutor's argument was not in response to defense argument, the trial court failed to inquire into the availability of the uncalled witnesses, and the prosecutor argued that an "adverse inference" is permitted from the defendant's failure to call witnesses he had subpoenaed for trial.

alone bore the burden of proof, any conceivable prejudice from the prosecutor's response was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

2. Petitioner also claims (Pet. 8-9) that the trial court erred in failing to declare a mistrial after a juror overheard an out-of-court comment made by a government witness. However, the "highest degree of respect" must be accorded a trial court's decision in matters of this kind (*Arizona* v. *Washington*, 434 U.S. 497, 511 (1978); see also *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976)), and the record in this case reveals that the court acted well within its discretion in denying petitioner's motion.

Carl Jackson testified for the government at trial (Tr. 86-122). He repeatedly asserted that although there had been someone other than the six co-defendants at Harralson's car lot when the whiskey was unloaded, he did not know who that individual was (Tr. 100, 115-117). During a morning recess following Jackson's testimony, one of the jurors overheard Jackson talking to friends in the coffee shop. Contrary to his testimony in court, Jackson then stated that Harralson, another defendant, had been standing right next to him when he unloaded the whiskey (Nov. 17, 1978 Tr. 4).[5] The next day, during the course of jury deliberations, the juror, Mr. Huber, sent a message to the court as follows: "If a juror overheard a witness outside of court admit he told a lie on the witness stand, does this interest you or should it even be considered in our deliberations?" (Tr. 363). Upon learning

[5]Jackson was reported to have said, "Hell, Fletcher was right next to me when I unloaded the whiskey." "Fletcher" was an alias used by Harralson.

of the question, counsel for petitioner moved for a mistrial (Tr. 364). The court postponed ruling on petitioner's motion and responded to the juror's question by instructing that the credibility of a witness is for the jury to decide (Tr. 364-365). Counsel for petitioner stated that he had no objection to such a charge (Tr. 365-366). Later, the court convened in chambers with counsel and questioned juror Huber about the statement he had overheard (Nov. 17, 1978 Tr. 2-14). The court then denied petitioner's motion for a mistrial, finding that petitioner had not been prejudiced by the out-of-court comment (Pet. App. 1a-4a).

On this record, the court was manifestly correct in concluding that it was not required to abort the trial. The hearing with Huber established that he had no private conversation with Jackson but had simply chanced to overhear Jackson's out-of-court statement.[6] Although petitioner argues (Pet. 8) that the impact of the out-of-court statement "is only subject to speculation," no conceivable impact that this statement might have had on Huber would have prejudiced petitioner. The statement exclusively concerned Harralson's involvement and accordingly could not have contributed to the substantive case against petitioner, whether or not it was believed—a point petitioner does not dispute. To the extent the comment might had affected Huber's assessment of the case in general, the impact surely would have been adverse to the government—and concomitantly favorable to petitioner—by casting into doubt the veracity of a government witness. Finally, petitioner's participation in the offense had been clearly established by the other

[6]This case is therefore altogether unlike *Turner* v. *Louisiana*, 379 U.S. 466 (1965). In *Turner*, the jurors had continuous contact and numerous conversations over a three-day period with two deputy sheriffs who were witnesses for the government.

witnesses at trial; Jackson's testimony was simply not pertinent to the issues affecting petitioner's guilt or innocence.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[7]For this reason, there is nothing in petitioner's suggestion (Pet. 8-9) that his conviction rested in part on perjured testimony. Not only did the testimony not involve petitioner, it was perjurious evidently only to the extent it exculpated Harralson. Moreover, there is no evidence that the government was aware at the time of trial that Jackson's testimony, about Harralson or any other subject, was untrue.

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